No. 80-1406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRVING L. GARTENBERG,

Petitioner,

—against—

HONORABLE MILTON POLLACK, Judge, United States District Court for the Southern District of New York (MERRILL LYNCH ASSET MANAGEMENT, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and MERRILL LYNCH READY ASSETS TRUST, real parties in interest),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in refusing to reverse, by writ of mandamus, the District Court's decision that Petitioner was not entitled to a jury trial in an action for breach of fiduciary duty under Section 36(b) of the Investment Company Act of 1940, in light of the traditionally equitable nature of Petitioner's claims for an accounting and restitution and the express and undisputed Congressional intent to create an equitable cause of action under Section 36(b) triable to a court?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties* appearing in the District Court and the Court of Appeals are listed in the caption.

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* Respondents Merrill Lynch Asset Management, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated are wholly-owned subsidiaries of Merrill Lynch & Co., Inc., a publicly-held financial services company.

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STATEMENT OF THE CASE

Statement of Facts

This action involves an alleged breach of fiduciary duty under Section 36(b) of the Investment Company Act of 1940 (the "Act") brought by a shareholder ("Petitioner") of the Merrill Lynch Ready Assets Trust (the "Trust").

The Trust is a no-load mutual fund that invests primarily in short-term money market securities.* It is a registered investment company under the Act and is managed by Merrill Lynch Asset Management, Inc. ("MLAM"). MLAM is compensated for its services pursuant to an investment advisory agreement with the Trust which provides for a descending schedule of fees based upon the size of the Trust's assets. Orders for the purchase and sale of shares of the Trust are processed in large part by an affiliated company, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPF&S"). The Trust, MLAM, and MLPF&S ("Respondents") have all been joined as defendants in this action, which is pending in the Southern District of New York.

Section 36(b) of the Investment Company Act of 1940, as amended by Congress in 1970 (15 U.S.C. § 80a-35(b)), provides that an investment adviser is deemed to have a fiduciary duty with respect to the receipt of compensation for services rendered to a registered investment company. The section further provides that a shareholder of a

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* *E.g.*, short-term United States Government securities; Government agency securities; bank certificates of deposit and bankers' acceptances; short-term corporate debt securities such as commercial paper and variable amount master demand notes; and repurchase and reverse repurchase agreements.

registered investment company may bring a derivative action against the investment adviser and others receiving compensation "for breach of fiduciary duty in respect of such compensation. . . ."

The Amended Complaint alleges that the "advisory fees paid by the Trust to the Adviser are exorbitant, unreasonable, excessive, and completely disproportionate to the services rendered in return therefor" (Amended Complaint ¶ 17, Apdx. 28a),* and that MLAM has therefore *breached its fiduciary duty* to the Trust under Section 36(b) of the Act (Amended Complaint ¶ 19, Apdx. 28a). Petitioner demands judgment requiring MLAM and MLPF&S "to *account* to the Trust for all excessive advisory fees paid to [MLAM] by the Trust . . . and to *repay such fees to the Trust*". (Amended Complaint, demand for relief, ¶ 1, Apdx. 29a). (Emphasis supplied).

The Proceedings Below

Petitioner made a jury demand, which Respondents moved to strike. On March 18, 1980, in a thorough and well-reasoned opinion, Judge Milton Pollack granted the motion.**

Petitioner subsequently moved pursuant to 28 U.S.C. § 1292(b) to add an appeal certificate to the court's order striking the jury demand. Judge Pollack denied that motion, ruling that there is "no substantial ground for

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* "Apdx." refers to the Appendix to the Petition for a Writ of Certiorari.

** The District Court's opinion is officially reported at 487 F. Supp. 999 (S.D.N.Y. 1980), and is reprinted in the Appendix to the Petition at pages 7a-23a. The opinion is unofficially reported at [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,315 (S.D.N.Y. March 18, 1980).

difference of opinion." Petitioner thereafter petitioned the Court of Appeals for a writ of mandamus to review Judge Pollack's action. The Court of Appeals carefully analyzed the Complaint and the relief sought, and denied the writ.* It thereafter denied Petitioner's request for a rehearing *en banc*. (Apdx. 24a).

The Opinion of the District Court

Judge Pollack granted Respondents' motion to strike Petitioner's demand for a jury trial on three separate grounds.

First, he held that the legislative history of Section 36(b) demonstrates that Congress intended to create an equitable cause of action when that section was enacted in 1970. The House and Senate reports accompanying the bill that created Section 36(b) repeatedly describe the new cause of action it created as "an equitable action", and Congress adhered to this description even after this Court held in *Ross* v. *Bernhard*, 396 U.S. 531 (1970), that not all derivative actions are equitable in nature merely because they are brought in the right of the corporation. Judge Pollack noted that Congress' choice of the word "equitable" to describe a statutory cause of action is considered a knowing rejection of jury trials in actions brought pursuant to the statute. *Lorillard* v. *Pons*, 434 U.S. 575, 583, 585 (1978). In short, the District Court concluded that "[t]here can be no question about Congress' intent here." (Apdx. 17a). No claim was made in the Court of Appeals that the holding was incorrect, nor does the Petition for Certiorari raise that issue.

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* The opinion of the Court of Appeals is officially reported at 636 F.2d 16 (2d Cir. 1980), and is reprinted in the Appendix at pages 1a-6a. The opinion is unofficially reported at [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,653 (2d Cir. Oct. 9, 1980).

Judge Pollack's second ground for striking Petitioner's jury demand was that actions for breach of fiduciary duty, such as that created by Section 36(b), have traditionally sounded in equity. The court observed:

> A functional analysis of the statute makes it clear that actions under it must be considered equitable. Historically, actions based on breaches of fiduciary duty have sounded in equity.

(Apdx. 18a). Petitioner here raises no issue as to the propriety of that holding, either.

Finally, the District Court struck the jury demand because the relief sought in the Complaint—an accounting and repayment of allegedly excessive fees—is purely equitable in nature. Petitioner had acknowledged in the District Court that an accounting was an equitable form of relief in these circumstances, but argued, and repeats here, that because Section 36(b) provides for a recovery of "damages", the remedy must be deemed "legal."

Judge Pollack rejected that argument, finding that the word "damages" in Section 36(b) was used simply to connote a money judgment, and pointed out that this Court has held that not all claims for money damages are triable to a jury. *Curtis* v. *Loether*, 415 U.S. 189, 196-97 (1974). He further held that Petitioner's demand that defendants "repay" to the Trust allegedly excessive fees "is in substance and reality restitution." (Apdx. 20a). Although restitution is not always an equitable remedy, the District Court recognized, "in circumstances such as those presented here, restitution has been held to be an equitable remedy." (Apdx. 20a). It is this holding—and only this holding—that Petitioner directly attacks here.

The Opinion of the Court of Appeals

The Petition for a Writ of Mandamus, like the present Petition for Certiorari, relied heavily upon the statute's use of the term "damages". Petitioner argued that any action pursuant to Section 36(b) must be an action for damages, and therefore an action at law. The Court of Appeals disagreed, holding that the statute's reference to "damages" does not preclude an equitable action for restitution. Noting that "[t]he issue in this case involves the equitable inquiry whether the Trust adviser violated its fiduciary obligations by charging an exorbitant fee", the Court of Appeals concluded that Petitioner seeks to have equity "trace" the allegedly excessive portion and "compel its repayment". (Apdx. 5a).

SUMMARY OF ARGUMENT

The Petition raises no issue warranting review by the Court. The courts below fully considered and correctly decided the issues disputed here. Their decisions reflect a proper application of principles laid down by this Court.

There are, moreover, no compelling circumstances meriting review at this time. The decisions below are interlocutory in nature. Discovery has been completed and the case is now ready to be set down for trial. Extensive time has been expended by all parties in preparing proposed findings of fact and conclusions of law for a bench trial. Petitioner has not attempted, in any way, to defer—pending the Petition for Certiorari—the substantial effort which preparation of these findings involved. Granting review at this time would necessitate

an indefinite, undesirable and unwarranted delay of the trial. Review is also unnecessary since the decisions below are in accord with decisions by this Court and other federal courts concerning the right to a jury trial.

REASONS FOR DENYING THE WRIT

POINT I

THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE

The Petition proceeds from a fundamental, but erroneous, premise: that because Section 36(b) of the Investment Company Act of 1940, as amended, provides for the recovery of "damages", the Constitution requires that the cause of action created by Section 36(b) be tried to a jury.

The teaching of *Ross* v. *Bernhard*, 396 U.S. 531 (1970), however, is that the right to a jury trial in a derivative action turns not merely on the characterization of the remedy sought but, more fundamentally, on an examination of the corporation's *underlying claim*. If the corporation's claim is legal, there is a constitutional right to a jury trial; if it sounds in equity, that right does not exist. *Id.* at 538-39.*

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* The Seventh Amendment to the Constitution preserves the right to a trial by jury in "Suits at common law." Where Congress has created a statutory cause of action, the availability of a jury trial depends on whether the action "involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." *Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974). *See Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

A. An Action for Breach of Fiduciary Duty Is Equitable in Nature

Section 36(b) creates an action for breach of fiduciary duty. As the District Court correctly noted, "[h]istorically, actions based on breaches of fiduciary duty have sounded in equity." (Apdx. 18a). *Accord*, *Schine* v. *Schine*, 367 F.2d 685, 687 (2d Cir. 1966).* *See Twin-Lick Oil Co.* v. *Marbury*, 91 U.S. 587, 587-88 (1876). Thus, actions for breach of fiduciary duty are traditionally tried to the court, sitting without a jury. *Atwood* v. *Pacific Maritime Ass'n*, 432 F. Supp. 491 (D. Ore. 1977).

Petitioner has failed to cite a single authority to contradict the general rule that an action for breach of fiduciary duty, not founded on a purely legal claim such as negligence, is equitable in nature:

> Traditionally, the remedies of the beneficiary of a trust against the trustee *were exclusively within the jurisdiction of equity.* And it does not become so "legal" as to compel jury intervention merely because the "accounting" is inevitably in dollars.

Local No. 92, Int'l Ass'n of Bridge Workers v. *Norris*, 383 F.2d 735, 741 (5th Cir. 1967). (Footnote omitted; emphasis supplied). That general rule is applicable here.

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* The Court of Appeals' view in *Schine* that a claim for an accounting based on a breach of fiduciary duty sounds in equity is particularly applicable here, because Petitioner has in fact demanded an accounting and alleges a breach of fiduciary duty. (Amended Complaint ¶ 19, Apdx. 28a; Amended Complaint, demand for relief, ¶ 1, Apdx. 29a).

B. The Legislative History Demonstrates That Section 36(b) Creates An Equitable Cause of Action

The legislative history of Section 36(b) buttresses the conclusion that the general rule of equitable jurisdiction is applicable here. Both the District Court and the Court of Appeals recognized that the legislative history of Section 36(b) underlines Congress' intent to create a suit in equity, not an action at law.* (Apdx. 14a-17a; 3a). In this respect, the Report by the House Committee that considered Section 36(b) clearly demonstrates that Congress intended to create an equitable action:

> The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 17333) to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define *the equitable standards* governing relationships between investment companies and their investment advisers and principal underwriters, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass. [page 1]
>
> * * *
>
> Section 36(b) authorizes the Commission and also a shareholder acting on behalf of the fund to institute *an equitable action* involving a claim of breach of fiduciary duty. [page 38]

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* It should be noted that the practice under the predecessor statute was to try the action to a court, sitting without a jury. *See, e.g., Aldred Investment Trust* v. *Securities & Exchange Comm'n*, 151 F.2d 254, 261 (1st Cir. 1945), *cert. denied*, 326 U.S. 795 (1946) ("Section 36 invokes the equity power of the Federal Court"); *Securities & Exchange Comm'n* v. *Quing N. Wong*, 252 F. Supp. 608, 613 (D.P.R. 1966); *Acampora* v. *Birkland*, 220 F. Supp. 527 (D. Colo. 1963). Congress is presumed to be aware that the courts had denied jury trials under a predecessor statute, and is presumed to adopt that interpretation when, as here, it enacts a new law which incorporates sections of the prior statute. *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978).

* * *

> Although section 36(b) provides for *an equitable action* for breach of fiduciary duty as does section 36(a), the fact that subsection (b) specifically provides for a private right of action should not be read by implication to affect subsection (a). [page 38]

H. R. Rep. No. 91-1382, 91st Cong., 2d Sess. at 1, 38 (Aug. 7, 1970), *reprinted in* Fed. Sec. L. Rep. (CCH), Special Report No. 323 (Extra ed. Aug. 11, 1970). (Emphasis supplied).

The Senate Report is to the same effect. S. Rep. No. 91-184, 91st Cong., 1st Sess. at 1, 15-16 (May 21, 1969), *reprinted in* [1970] U.S. Code Cong. & Admin. News at 4897, 4910-11.

Further, the Report of the Conference Committee—submitted after this Court's decision in *Ross* v. *Bernhard*, 396 U.S. 531 (1970)—confirms that Section 36(b) creates an equitable cause of action for breach of fiduciary duty:

> The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2224) to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define *the equitable standards* governing relationships between investment companies and their investment advisers and principal underwriters. . . .

H. R. Conf. Rep. No. 91-1631, 91st Cong., 2d Sess. (Nov. 25, 1970), *reprinted in* [1970] U.S. Code Cong. & Admin. News at 4943. (Emphasis supplied).

This conclusion finds further support in the testimony of Judge Henry J. Friendly who had been invited to testify before a Congressional committee in connection with an earlier version of the final bill. Judge Friendly made clear that an action brought to recover unreason-

able advisory fees would be equitable in nature and thus would not be tried to a jury:

> . . . I would suppose that the courts would develop intelligible guidelines within a relatively short time. That result would be aided by the fact that *since actions to recover unreasonable fees are equitable in nature, they would be tried to judges and not to juries.**

This Court has recognized that Congress distinguishes between the terms "legal" and "equitable" with full awareness of their significance regarding the right to trial by jury and has declared that the courts should accord considerable deference to Congress' decision. *Lorillard* v. *Pons*, 434 U.S. 575, 583, 585 (1978). It is clear that Congress, in enacting Section 36(b), intended to create an equitable action, triable to a court and not to a jury.

C. The Provision for "Damages" Does Not Create a Legal Cause of Action

Petitioner argues that the use by Congress of the word "damages" to describe the nature of the recovery under Section 36(b) requires the conclusion that, despite the equitable design of the statute and its unequivocal legislative history, the statute creates an action at law which is triable to a jury. This is simply not true.

As the District Court correctly held (Apdx. 19a):

> Far from being conclusive, the presence of the word "damages" merely launches the inquiry into the legislative intent behind the wording of § 36(b).

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* *Investment Company Act Amendments of 1967, Hearings before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. at 796 (Dec. 9, 1969) (statement of Judge Henry J. Friendly).

In the context of the statute and the legislative history, the District Court held that the term "damages" was merely used as a "short-hand for 'recovery of money', not as a legal term of art." (Apdx. 19a). Thus, the District Court correctly reasoned that while Congress provided in Section 36(b) for a monetary award, it did not thereby expunge its clearly expressed intent to create an equitable cause of action. Similarly, the Court of Appeals held that the statute's reference to "damages" is irrelevant because Petitioner's suit is for restitution, not damages. (Apdx. 6a).

Regardless of the label attached to the recovery Petitioner seeks, it is of no significance that any recovery would necessarily be in the form of a money judgment. It is well settled that not all money claims are triable to a jury. *Curtis* v. *Loether*, 415 U.S. 189, 196-97 (1974); *Securities & Exchange Comm'n* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978). *See Swofford* v. *B & W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *Local No. 92, Int'l Ass'n of Bridge Workers* v. *Norris*, 383 F.2d 735, 741 (5th Cir. 1967); *Marr* v. *Rife*, 363 F. Supp. 1362, 1363 (S.D. Ohio 1973). Thus, the mere fact that Section 36(b) provides for a monetary award does not imply that the cause of action it creates is necessarily legal, or that it affords a right to trial by jury.

D. The Remedies Sought Are Equitable in Nature

Petitioner's own demand for relief demonstrates the essentially equitable character of the relief available under Section 36(b). Petitioner demands judgment requiring defendants "to *account* to the Trust for all excessive advisory fees paid to [the investment adviser] by the Trust . . . and to *repay* such fees to the Trust." (Amended

Complaint, demand for relief, ¶ 1, Apdx. 29a). (Emphasis supplied). Petitioner has implicitly conceded that the prayer for an accounting is a request for equitable relief. (Petition for Writ of Mandamus at 19; District Court Opinion at Apdx. 19a). *See generally Schine* v. *Schine*, 367 F.2d 685, 687 (2d Cir. 1966). Furthermore, as both the Court of Appeals and the District Court held, by demanding the repayment of allegedly excessive advisory fees to the Trust, Petitioner is seeking the equitable remedy of restitution. (Apdx. 5a-6a; 19a-21a). There is no doubt that the courts below were correct in holding that the entire relief sought is equitable in nature.

The Court of Appeals similarly concluded that Petitioner seeks restitution, not damages, and therefore is not entitled to a jury trial. In so finding, the Court of Appeals relied upon its opinion in *Securities & Exchange Comm'n* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978), where it held:

> [N]ot all money claims are triable to a jury. A historic equitable remedy was the grant of restitution "by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." . . . And "[w]hen restitution is sought in the form and in the situations allowed in equity prior to the rules or authorized by valid statutes there is no right to jury trial."

Id. at 95. (Citations omitted).*

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* *Accord, Securities & Exchange Comm'n* v. *Associated Minerals, Inc.*, 75 F.R.D. 724, 726 (E.D. Mich. 1977) (striking a demand for a jury trial because the plaintiff's request for "disgorgement of investor funds seeks a form of restitution which has historically been allowed only in equity"); *Securities & Exchange Comm'n* v. *Asset Management Corp.*, 456 F. Supp. 998, 999 (S.D. Ind. 1978) (denying defendants' motion for a jury trial "since plaintiff asks for the relief of disgorgement" and restitution is a "historic equitable remedy"). *See Commodity Futures Trading Comm'n* v. *Hunt*, 591 F.2d 1211, 1222 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979) (noting that "the authority to grant disgorgement is found in the traditional equity powers of a court").

In *Maldonado* v. *Flynn*, 477 F. Supp. 1007 (S.D.N.Y.), *petition for writ of mandamus denied sub nom. In re William Maldonado*, No. 79-3072 (2d Cir. Oct. 12, 1979), Judge Weinfeld similarly held that a stockholder's derivative action was equitable in nature and consequently struck plaintiff's demand for a jury trial. In *Maldonado*, plaintiff sought repayment to the corporation of compensation paid to directors, based on alleged violations of the securities laws:

> *Each claim, whether for* printing and mailing expenses or *recapture of compensation* and expenses paid to directors, *basically seeks restitution for the benefit of the corporation*. Despite plaintiff's reiterated assertion that the claims are to recover "money damages," they are essentially equitable in nature. *The fact that recovery of "money damages" is sought does not change the basic nature of the claims.* . . .
>
> In the event plaintiff prevails, it is clear that to the extent it is established that the corporation was damaged, restitution would be the remedy. Accordingly, defendants' motion to strike the jury demand in plaintiff's amended complaint is granted.

Id. at 1011. (Footnote omitted; emphasis supplied).

Nor do Petitioner's cases hold to the contrary. Petitioner contends that restitution is not an exclusively equitable remedy and that it is available in actions at law. While this may be true in some instances, in circumstances such as those presented here, the courts have held that restitution is an equitable remedy requiring a trial to the court. *See, e.g., Securities & Exchange Comm'n* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978).

Indeed, the very authorities relied on by Petitioner dictate this conclusion. For example, *Roberts* v. *Ely*, 113 N.Y. 128, 20 N.E. 606 (1889), cited by Petitioner (page 11), makes clear that where the action seeks an accounting and restitution from a fiduciary, the remedy is exclusively equitable. 113 N.Y. at 132, 20 N.E. at 608. The only exceptions outlined by that court, such as cases involving bailments and actions for money had and received, are simply not applicable here.* *See id.*

The conclusion of the courts below that Petitioner seeks monetary relief in the nature of restitution or disgorgement is consistent with well established common law principles. Any grant of such restitutionary relief would be an exercise of traditional equity powers. *E.g.*, *Securities and Exchange Comm'n* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978). *See Commodity Futures Trading Comm'n* v. *Hunt*, 591 F.2d 1211, 1222 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979); *Securities & Exchange Comm'n* v. *Associated Minerals, Inc.*, 75 F.R.D. 724, 726 (E.D. Mich. 1977). Petitioner is seeking, as the Court of Appeals stated in *Commonwealth Chemical*, to invoke "the chancellor's discretion to prevent unjust enrichment." 574 F.2d at 95.

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* Petitioner relies heavily on the applicability of *indebitatus assumpsit*, or an action for money had and received. The gist of this common law cause of action is that "one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it, and ex aequo et bono it belongs to another." *J. W. Carter Music Co.* v. *Bass*, 20 F.2d 390, 393 (S.D. Tex. 1927), cited by Petitioner at 9, 10. Petitioner refers to numerous cases for that proposition, but none of those cases—many of which were decided decades ago—is comparable to the situation presented here. The simple fact that law courts assumed jurisdiction in *assumpsit* in no way undermined equity's traditional jurisdiction "over nearly all situations involving a breach of a fiduciary duty. . . ." *Restatement of Restitution*, Introductory Note at 9 (1937).

Since the relief sought in this action is exclusively equitable, the Court of Appeals was correct in refusing to reverse, by way of mandamus, the District Court's decision striking the jury demand.

POINT II

NO COMPELLING CIRCUMSTANCES MANDATE GRANTING OF THE WRIT

A. The Question Presented Is Not Ripe for Review by This Court

This Court has long been disinclined to review interlocutory decisions, and rightly so. *See Cobbledick* v. *United States*, 309 U.S. 323, 324-26 (1940); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U.S. 372, 384 (1893).

The greatest inconvenience that could result from denying the present Petition would be a new trial, assuming, of course, that Petitioner was dissatisfied with the result of the first trial and it is ultimately determined that the case warranted trial to a jury. But a new trial hardly qualifies as "extraordinary inconvenience and embarrassment", especially where, as here, the trial is not expected to be protracted. *See American Construction Co.* v. *Jacksonville Railway Co.*, 148 U.S. at 384.

Nor does the fact that this case involves questions concerning the right to a jury trial dictate a different conclusion. In the last few years alone, this Court has refused to review a number of interlocutory decisions denying the right to a jury trial. *E.g.*, *Ducharme* v. *Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir.),

cert. denied, 439 U.S. 1002 (1978); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn.), *aff'd sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 578 F.2d 1289 (2d Cir. 1976), *cert. denied*, 434 U.S. 969 (1977); *Commonwealth* v. *Wheeling-Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320, *cert. denied*, 434 U.S. 969 (1977); *Rozelle* v. *Connecticut General Life Ins. Co.*, 471 F.2d 29 (10th Cir. 1972), *cert. denied*, 411 U.S. 921 (1973).

Refusal to review the jury issue is particularly appropriate here. Unless the writ is granted, the trial is expected to go forward and be concluded in the very near future. Over the past few months, counsel for Petitioner and Respondents have met repeatedly in preparation of elaborate proposed findings of fact and conclusions of law for use by the court, and it is anticipated that a date for trial will be fixed in the near future.

Moreover, at no time has the Petitioner ever endeavored to stay any of the proceedings in this action pending resolution of the jury issue. Indeed, this Petition was not filed until the very last day permitted by the Rules of this Court. As a result, Respondents have spent extensive time preparing the case for a trial to the court.

Under these circumstances, Petitioner cannot now be heard to say that immediate review is compelled by the present posture of this case. To the contrary, a granting of the writ will mean only an indefinite delay in the trial of this action, and a resultant waste of time for both counsel and the Court. Moreover, depending upon the future course of this case, the jury trial issue may reach this Court in an entirely different posture, or not at all.

B. The Decisions Below Are Not in Conflict with the Decisions of This or Any Other Court

Contrary to Petitioner's claim, the decisions below do not conflict with the decisions of this Court or any other court.

Petitioner asserts (pages 6-7) that the lower court holdings conflict with the general principles articulated in *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962). This is simply not the case.

In *Dairy Queen*, plaintiff alleged that defendant had breached its contract to pay for the exclusive use of a trademark, and sought both injunctive relief and an accounting to determine the amount of money owed him. This Court held that plaintiff was entitled to a jury trial because he had clearly alleged an action at law for breach of contract, even though he had cast his prayer for relief in terms of an accounting.

In contrast, Petitioner here asserts—and the courts have found—a clearly equitable cause of action for breach of fiduciary duty and equitable remedies of accounting and restitution. *See* discussion at pages 9-17, *supra*. He has not and cannot cite to any decisions in conflict with that result. There is simply no federal judicial conflict on that issue which warrants review by this Court.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition for Certiorari should be denied.

Dated: March, 1981

Respectfully submitted,

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